

Solutions to the City Attorney's Charter-Imposed Conflict of Interest Problem

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City attorneys who are required by the city charter to represent both the mayor and the city council face the possibility of having conflicts of interest that would be otherwise impermissible in the private sector should the mayor's interest and the city council's interest diverge. This Note analyzes the city attorney's ethical obligations in the context of the method of her selection and the scope of her representation to identify who her client is and to minimize potential conflicts of interest. Because the law of ethics for city attorneys in conflict of interest situations is fundamentally unclear, this Note proposes several solutions designed to avoid conflicts of interest for city attorneys which can be implemented by city and state officials to help prevent substandard legal representation of the city government.

I. INTRODUCTION

Early in their legal training, lawyers are ingrained with the knowledge that conflicts of interest should be avoided. Yet some conflicts of interest that have recently captured the news media's attention have a distinct quality—they are imposed by city law. City charters often require the city attorney and her staff of assistant city attorneys to provide legal advice and representation to the city council, the mayor, and city departments and agencies.¹ When these government bodies have different goals for the city as a whole, a conflict of interest may occur for the city attorney. An attorney in private practice can avoid this conflict of interest situation by declining to represent a potential client if the representation would result in a conflict of interest. The city attorney usually has no such option. Consider the following three situations that have recently occurred in cities in different areas of the nation.

In San Diego, a financial crisis has unfolded that threatens to implicate top city officials.² The crisis stems from a deficit in the city's under-funded pension system and from city officials failing to make the proper financial disclosures to investors and to the public about that deficit.³ The Securities

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¹ See *infra* notes 51–58 and accompanying text.

² Matthew Hall, *Aguirre Begins Finances Inquiry: Case is Independent of One Authorized By City Council*, SAN DIEGO UNION-TRIB., Dec. 10, 2004, at B1.

³ Philip J. LaVelle, *Pension Report Slams City Hall: Document: Errors Rooted in Confusion and Dysfunction*, SAN DIEGO UNION-TRIB., Sept. 17, 2004, at A1. LaVelle's

and Exchange Commission, the U.S. Attorney's Office, and the Federal Bureau of Investigation are all investigating the city's finances.⁴ The city has hired an outside auditor to conduct the overdue 2003 and 2004 audits.⁵ The auditing firm revealed that possible illegal activity in the city administration was not properly investigated by city hall.⁶

The San Diego city attorney is bound by San Diego's charter to represent and advise the city and all of its departments and officers, including the city council, in all legal matters.⁷ The city attorney announced that he would open his own investigation into the city employees' fraudulent accounting and withholding of information from financial documents, independent of an investigation authorized by the city council, which hired an outside law firm to do the work.⁸ He also announced that he would reopen the public integrity unit of the city attorney's office, which is responsible for prosecuting city employees for misdemeanors of fraud, waste, and abuse of city resources.⁹ According to the charter, the city attorney represents, in their official capacities, the top officials implicated by the federal investigations, and also represents those city government officials who wish to expose and correct the wrongdoing.¹⁰ Both clients have vastly different interests. For whom should the city attorney advocate?

Across the nation from San Diego, Cleveland recently passed the Fannie M. Lewis Cleveland Resident Employment Law that provides for twenty

article reports that "city officials improperly spent money from pension fund earnings that should have been plowed back into the system while adopting a minimalist approach to disclosure." *Id.* The San Diego City Employees Retirement System has a deficit of \$1.17 billion. *Id.* While the report, issued by Vinson & Elkins LLP, who represents the city in an investigation by the SEC, did not attribute the non-disclosure to intentional errors, pension trustee Diann Shipione disagreed with that aspect of the report, saying that "[t]here is a premise [in the report] that people in city government did not know the consequences of their actions, which they clearly did." *Id.* Ultimately, the report found that the pension deficit was caused by "'the city . . . balanc[ing] its budget by transferring the burden of its labor settlements to a misconstrued (pension) surplus . . . a clever short-term solution to a budget squeeze that grew into a long term problem. . .'" (quoting Paul Maco, head of the Vinson & Elkins team). *Id.*

⁴ Matthew Hall, *Outsider Moves in for a Fight Against City Hall: Mixed Views Greet Aguirre's Ambitious Moves on First Week*, SAN DIEGO UNION-TRIB., Dec. 12, 2004, at B1.

⁵ Philip J. LaVelle, *Aguirre Asserts Control of Pension Legal Affairs*, SAN DIEGO UNION-TRIB., Dec. 17, 2004, at A1.

⁶ *Id.*

⁷ SAN DIEGO, CAL., CITY OF SAN DIEGO CHARTER, art. V, § 40 (2004).

⁸ Hall, *supra* note 2.

⁹ *Id.* See also Matthew Hall, *Aguirre a Swearing-In Hit: Remarks on City in Crisis Bring Crowd in Golden Hall to Its Feet*, SAN DIEGO UNION-TRIB., Dec. 7, 2004, at B1.

¹⁰ See SAN DIEGO, CAL., CITY OF SAN DIEGO CHARTER, art. V, § 40 (2004).

percent of the jobs in construction projects for the city to go to Cleveland residents.¹¹ The hotly debated law was high on the agenda of the city council president.¹² After the law passed, the Ohio Department of Transportation communicated to the law department that the law possibly violated federal guidelines.¹³ The mayor worked out a deal with a contractor who had won the bid for an impending project, which was supposed to be subject to the new law, to meet the twenty percent set-aside while the city filed suit seeking a declaratory judgment that the law was valid.¹⁴

Neither the mayor nor the law department informed the council president of the problems with the law.¹⁵ When he finally learned of the problems, he was vehemently opposed to the mayor's strategy and wanted the law department to defend the law more vigorously.¹⁶ Although the mayor is the executive responsible for implementing laws, the law director is bound by the city charter to be legal counsel for all departments and officers of the city, and to provide legal opinions to the city council and department directors on any question of law or on legal matters relating to their official functions.¹⁷ Essentially, the law director is required to represent the mayor and the city council simultaneously. Whose course of action should the law director support in this instance?¹⁸

Moving south, in Tampa, Florida, the city council has recently hired its own independent attorney, pre-empting a conflict of interest for the city

¹¹ CLEVELAND, OHIO, CODIFIED ORDINANCES ch. 188 (2004).

¹² Mike Tobin, *Set-Aside Law No Threat to Funding: ODOT Clears Way for Cleveland Project*, PLAIN DEALER, June 12, 2004, at B3.

¹³ *Id.*

¹⁴ Editorial, *A Broken Bond: By Not Telling the Council President of Impending Problems, Campbell Has Alienated an Ally She Can Ill Afford to Lose*, PLAIN DEALER, Mar. 31, 2004, at B8 [hereinafter *Broken Bond*]. See *City of Cleveland v. State*, No. 04-CV-003423 (Franklin County Ct. Com. Pl. 2004).

¹⁵ Tobin, *supra* note 12.

¹⁶ *Broken Bond*, *supra* note 14. The council president suggested that the city award contracts with the set-aside despite the warning from the state and that the city then challenge the state if it did not fund those contracts. *Id.*

¹⁷ CLEVELAND, OHIO, CITY OF CLEVELAND CHARTER ch. 15, §§ 83, 86 (2004). Because the law director is required to represent officials and departments only in matters relating to their official duties, the law director is not required by the charter to give any deference to the city council when assisting the mayor in implementing a law, as the council's official duty is to make the laws, while it is the official duty of the mayor to execute them. See *id.* ch. 5 (describing official functions of Cleveland City Council); *id.* ch. 11 (describing official functions of the executive branch). The applicable ethics rules, however, prohibit representing two clients whose interests are adverse. See *infra* notes 51-61 and accompanying text.

¹⁸ In this particular instance, the law director followed the mayor's direction. See *Broken Bond*, *supra* note 14.

attorney if the council's interests and the mayor's interests should differ.¹⁹ The city charter provides that the mayor appoints the city attorney and that the city council must confirm the appointment.²⁰ The charter also says that the city attorney is the legal counsel for the mayor, the city council, and all departments and offices in the city.²¹ When the mayor appointed a new city attorney in early 2004, the chief assistant city attorney, the council's trusted legal advisor, resigned.²² The city council bowed to pressure from the mayor to confirm the new city attorney immediately without the further consideration of the candidate that the council would have preferred.²³ Subsequently, the city council, concerned that the council members did not have any real say in picking the city attorney, began to discuss hiring its own independent counsel, permitted by an amendment to the city charter made in the mid-1970s.²⁴ The council's hiring of an independent attorney who is not associated with the city attorney's office followed those discussions.²⁵ Should cities implement the Tampa solution and amend their charters to allow, or even require, the city council to have counsel that is independent from the mayor's legal advisor?

This Note argues that city charters pose an impermissible conflict of interest for the city attorney²⁶ when the city attorney is required to represent separate government entities, like the mayor and the city council, when their interests are adverse. Part II discusses the difficult threshold issue of identifying a government attorney's client and concludes that previously developed popular models of client identification are inadequate to identify the city attorney's client.²⁷ Part III presents the city attorney's ethical obligations in the context of her method of selection and her scope of representation, and discusses how those factors might be used in client identification, concluding that while these factors may be helpful in minimizing some types of conflicts, they do not adequately address the

¹⁹ Kevin Graham, *Tampa Council Picks Attorney*, ST. PETERSBURG TIMES, May 28, 2004, at 4B.

²⁰ TAMPA, FLA., CITY OF TAMPA CHARTER § 6.03 (2004).

²¹ *Id.* at § 5.01.

²² Andy Reid, *Council OKs Smith as City Attorney*, TAMPA TRIB., Feb. 20, 2004, at 3.

²³ *Id.*

²⁴ *Id.*; see David Karp, *City Council Wants Say in Iorio Appointment*, ST. PETERSBURG TIMES, Feb. 13, 2004, at 3B.

²⁵ See Graham, *supra* note 19.

²⁶ The city attorney is variously referred to as director of law, law director, city solicitor, or municipal attorney. All of these are encompassed in this Note's use of city attorney, which refers to the attorney who handles the legal affairs for a city, often with a staff of assistant attorneys.

²⁷ See *infra* notes 30–50 and accompanying text.

conflict of interest problem.²⁸ Part IV presents and analyzes some changes that cities can implement to make identifying the city attorney's client easier while at the same time reducing or eliminating conflicts of interest.²⁹ Part IV concludes that the best solution is a charter amendment providing permanent independent representation to the city council.

II. IDENTIFYING THE GOVERNMENT LAWYER'S CLIENT

Identifying the client of the government lawyer is a threshold issue for determining whether a conflict of interest exists.³⁰ Like a private corporation, a government client is an organization, and the lawyer represents the interests of the organization as a whole.³¹ Because an organization cannot speak for itself, the lawyer takes direction from the organization's authorized representatives.³² A private corporation is usually easily identifiable as a discrete entity with certain constituents who are always authorized to speak for the corporation, making it fairly simple for an attorney hired by a corporation to identify her client and those individuals responsible for advancing its interests.³³ Because of the many levels of government and changing circumstances of representation, it is often more difficult to identify the government lawyer's client with certainty. For example, the client of a federal government agency lawyer could be the federal government as a whole, the executive branch of government, the President of the United States, the public, or the agency for which the lawyer works.³⁴

The question of exactly who the government attorney's client is has been addressed numerous times in the past.³⁵ Three major models have been

²⁸ See *infra* notes 51–79 and accompanying text.

²⁹ See *infra* notes 80–117 and accompanying text.

³⁰ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (2004). See Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265, 270 (1996) (noting that client identification is paramount because a lawyer's duty of confidentiality and duty to avoid conflicting interests is owed only to a lawyer's clients).

³¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 96–97 (2000). See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

³² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1)(b) (2000).

³³ See Anthony Saul Alperin, *The Attorney-Client Privilege and the White House Counsel*, 29 W. ST. U. L. REV. 199, 203–08 ("Identifying the client [of a government lawyer] involves an examination of the particular governmental structure involved and the relationship of its various agencies.").

³⁴ See, e.g., Jeffrey Rosenthal, *Who is the Client of the Government Lawyer?*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 13, 20 (Patricia E. Salkin ed., 1999).

³⁵ See *infra* notes 36–49 and accompanying text.

formulated in an attempt to answer the question and to give guidance to the government attorney as to who represents the interests that she must advance. These are the public interest model, the government as a whole model, and the employing government agency model.

A. *The Client Is the Public Interest*

Saying that the government attorney's client is the public interest is easy; it even sounds right—of course the government exists for the public. Though it may sound superficially reasonable, many legal commentators have rejected as unworkable the once-popular idea that the government attorney serves the public interest,³⁶ because the public interest is not universally defined.³⁷ The government lawyer's supervisor, the lawyer, and the elected officials involved may all have conflicting ideas about what is in the public interest.³⁸ While it is true that the public votes for elected officials and is thus

³⁶ William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 HOW. L.J. 539, 562 (1986).

³⁷ Rosenthal, *supra* note 34, at 16–17. See also Nancy J. Moore, *The Ethical Role and Responsibilities of a Lawyer-Ethicist: The Case of the Independent Counsel's Independent Counsel*, 68 FORDHAM L. REV. 771, 796 (1999); Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 39–40 (1990) (noting that defining the government attorney's client as the public interest “virtually guarantees that at some point the government lawyer will have multiple and competing interests”).

³⁸ Rosenthal, *supra* note 34, at 16–17. For a response to the proposition that government attorneys cannot serve the public interest because it is too difficult to identify exactly what the public interest is, see Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 791–92 (2000). Berenson argues that although government attorneys may not be able to identify an “overarching, all-purpose definition of the public interest that will apply generally across the full range of human affairs,” such an attempt is not necessary. *Id.* at 814. Government attorneys really only need to identify the public interest with respect to the legal issues on which they work. *Id.* These decisions can be based on “the familiar tools of legal practice, such as interpreting and applying judicial decisions, statutory and constitutional interpretation, and understanding and applying the broader norms of legal culture.” *Id.* at 817. Berenson goes on to address the objection to the public interest model with respect to the public not participating in day-to-day decisions of the government by advocating a “participatory model of bureaucracy.” *Id.* at 818–19. Participatory bureaucracy attempts to involve citizens in their government through “techniques includ[ing] public opinion polling, notice, comment, and hearing provisions relating to administrative regulations and even citizen representation on governmental committees.” *Id.* While Berenson acknowledges that government attorneys do not presently use these techniques to determine what the public interest is with respect to their particular duties, he contends that “it is possible to envision how such techniques might be employed by governmental legal bureaucracies in determining how to best serve the public interest.” *Id.* at 819.

the "ultimate authority for the government," the public, like the shareholders of a corporation, does not participate in day-to-day government operations and cannot give direction to the attorney.³⁹ This may lead to the attorney advocating her own idea of the public interest, in effect usurping the public's power to control government through its elected officials (in the common case where the government attorney is not an elected official).⁴⁰ With no clear guidance to the attorney about whose directions to follow or whose interests to advance, the public interest model leads to inadequate representation.⁴¹

B. *The Client Is the Whole Government*

A second model identifies the government lawyer's client as the whole government.⁴² Reasoning from the corporation analogy, this seems correct.

³⁹ Nolan, *supra* note 37, at 40. *But see* Berenson, *supra* note 38, at 814–19.

⁴⁰ Josephson & Pearce, *supra* note 36, at 564–65; Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 552 (2004) (advocating the government agency employer as client model).

⁴¹ Josephson & Pearce, *supra* note 36, at 564–65. Josephson and Pearce point out that an attorney trying to determine what the public interest is will almost inevitably impose her own views upon the matter. "The government lawyer who uses the public interest approach when policy colleagues are in conflict usurps the function of the client to provide her with instructions. . . . Such a lawyer is not a lawyer representing a client but a lawyer representing herself." *Id.* at 564. *But see* Bruce A. Green, Symposium, *Legal Ethics for Government Lawyers: Straight Talk for Tough Times: Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 238–39, 256–57 (2000) (arguing that government lawyers in civil litigation have an obligation to seek justice that may affect the zealous representation of their clients). Green analogizes the responsibility of a government lawyer to the responsibility of a corporate attorney:

Whether one views the client as the government, a government agency or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public. It may then be suggested that the government lawyer owes some derivative duties to the public, just as a corporation's lawyer owes derivative duties to shareholders This may mean, at the very least, that there is a duty to refuse to assist the client in violating its fiduciary duty to the public or in otherwise acting lawlessly. This may also mean that government lawyers should take the public interest into account when making decisions entrusted to them.

Id. at 269–70 (footnotes omitted).

⁴² *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2004); Panas, *supra* note 40, at 551. *See also* Solomon, *supra* note 30, at 272 (noting that California's law is that the public entity is the client). Many judicial opinions also assert that a government attorney's client is the government as a whole and not a specific branch, office, or department. *See In re Grand Jury Subpoena v. Doe*, 886 F.2d 135, 138 (6th Cir. 1989);

Identifying the client as the whole government, however, is not useful because it does not identify from whom a government attorney should take, or seek, direction and guidance. The legislative, executive, and judicial government branches frequently have competing interests.⁴³ This is true at the federal, state, and local levels. The government lawyer must identify a single government position to advance, or at least non-conflicting positions, to represent the entire government. That is an impossible task. Ultimately, this model shares the problems of the public interest model discussed above, in that the attorney cannot know what position to advocate in the case of conflicting positions taken by individuals or branches within the government as a whole.

C. The Client Is the Government Agency that Employs the Lawyer

The model currently favored identifies the government attorney's client as the government attorney's employing agency, narrowing down the client's identity.⁴⁴ The Restatement of the Law Governing Lawyers takes this position: "The preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation."⁴⁵ Representing a single agency lessens the possibility of conflicts of interests.⁴⁶ Like a corporation, the actual client is the agency, but the interests of the agency are determined by the agency officer or

Salt Lake County Comm'n v. Short, 985 P.2d 899, 904-05 (Utah 1999); EPA v. Pollution Control Bd., 372 N.E.2d 50, 51-53 (Ill. 1977).

⁴³ Panas, *supra* note 40, at 554. Panas argues that the entire government as the client would effectively be a violation of the separation of powers principle.

For the lawyer to take on the role of representing the government as one entity would therefore not only be impossible given how frequently the branches are at odds with each other, but also undermine the ways in which the branches and divisions of government are designed to check each other's powers.

Id.

⁴⁴ The government agency comment to Model Rule of Professional Conduct 1.13 states that the government lawyer's client is generally the government as a whole, though at times it may be a particular agency. The comment also acknowledges that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context." MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2004).

⁴⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000). The D.C. Circuit, however, has said that a federal executive branch attorney's loyalties cannot lie solely with the attorney's agency because of the attorney's duty to faithfully execute the laws of the country. *In re Lindsey*, 148 F.3d 1100, 1108 (D.C. Cir. 1998).

⁴⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000).

department head who has decision-making authority.⁴⁷ The agency officer lays out the agency's policy and position, giving the attorney clear guidance as to which interests to advance.⁴⁸ If a department head's policy interests conflict with the agency officer's interests within an agency, the attorney is obligated to advance the agency officer's interests.⁴⁹ Thus, the agency-as-client model is workable for the government attorney because it narrows the client down to a discrete unit that operates under one policy-making authority.

D. Adequacy of the Models of Client Identity for the City Attorney

The city attorney does not fit into the employing-agency-as-client model. The strength of the agency-as-client model is that it assumes the existence of a highest policy-making authority that can resolve any differences in defining the interests of the agency. The city attorney represents, by city law, the mayor and the city council, both policy-making bodies that have little authority over one another. When the mayor's interests and the council's interests are the same, the city attorney can fulfill her responsibilities. When those interests diverge, however, an ethical question is raised: whose interests should the city attorney advance? Factors different from the models set forth above must be considered to identify the city attorney's client.⁵⁰

III. IDENTIFYING THE CITY ATTORNEY'S CLIENT

The models described in Part II are inadequate to identify whose interests the city attorney should advance in the case of a conflict of interest between her clients who are designated by the city charter. The utility of the agency-as-client model lies in its assumption of a single policy-making authority that exists to define the agency's interests. Ideally, we would want to find a single

⁴⁷ See Rosenthal, *supra* note 34, at 21, 24.

⁴⁸ See Rosenthal, *supra* note 34, at 24. See also Nolan, *supra* note 37, at 41–42.

⁴⁹ Rosenthal, *supra* note 34, at 21.

⁵⁰ One city attorney maintains that “[t]he law director is free to act as negotiator, or even referee, among municipal officials engaged in intramural conflict” because the city is the real party in interest. Douglas Sale, *Who is My Client?: A Perplexing Question for Law Directors*, [Mar.-Apr. 1995] 7 Ohio Mun. Service (Gutherman) 21, 24. Sale's assertion that a city attorney can freely negotiate between two city officials follows his conclusion that the entity client model is the appropriate model to identify the city attorney's client. *Id.* at 23–24. The entity model maintains that the only client of the city attorney is the city government itself, and that the individual officials are co-agents of the city. *Id.* at 23. This model tends to ignore the real question: the requirement is that the city attorney take direction from the persons authorized to speak for the city, and if those persons are conflicted among themselves, whose course of action should the attorney follow? Answering the question necessitates making a choice.

authority to which the city attorney can turn for direction. Other commentators have considered a government attorney's ethical obligations in the context of her method of selection and the scope of her representation, because these factors may indicate that there is one client whose interests the government attorney is more obligated to advance than the others. Part III.A considers the city attorney's ethical obligations, Part III.B considers the city attorney's selection and the scope of her representation, and Part III.C analyzes how these factors can be used to identify the client of the city attorney in the case of a conflict of interest.

A. Ethical Obligations of the City Attorney

The Model Rules of Professional Conduct (Model Rules), and its predecessor, the Model Code of Professional Responsibility (Model Code), serve as models for many state ethics codes.⁵¹ These state ethics codes are the source of the ethical obligations for the city attorney. The ethical obligations of the city attorney are the same as the ethical obligations of any government attorney, which are in turn the same for all attorneys, public or private. The Model Rules address the specific obligations of government attorneys in certain areas to clarify that the Model Rules do not affect any statutory obligations or authority of the government attorney; the Model Rules do not exempt government attorneys from the application of any of these rules.⁵² The Model Rules say that an attorney should not undertake

⁵¹ The American Legal Ethics Library has a listing for each professional responsibility topic that denotes the states that have modeled their codes after the Model Rules, the states that have modeled their codes after the Model Code, and the states that conform to neither. The American Legal Ethics Library is part of Cornell Law School's Legal Information Institute and is available online at www.law.cornell.edu/ethics.

⁵² See, e.g., MODEL RULES OF PROF'L CONDUCT, SCOPE (2004); MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2004). But see MODEL RULES OF PROF'L CONDUCT R. 1.11 (2004). Model Rule 1.11 deals with conflicts of interest for current and former government employees. It treats government attorneys differently from private attorneys in that certain conflicts that may arise when an attorney transfers from government practice to private practice, from private practice to government practice, or from representing one government client to representing another government client are not governed by Model Rule 1.10, which deals with general imputation of conflicts of interest. Rule 1.11 has special imputation provisions. The purpose of Rule 1.11 is to balance the interest of preventing unfair advantage to a client with not making the rules so restrictive that they effectively prevent attorneys from either moving into a government position from private practice, or into private practice from a government position. *Id.* R. 1.11 cmt. 4. I argue that this rule does not come into play for a city attorney who is required to represent both the city council and the executive simultaneously, as the city attorney is not transitioning from representing one body to representing the other in the manner that Rule 1.11 describes. The policy concern of making it too difficult for an attorney to move from one place of employment to the next

representation of a client if the representation of that client will negatively affect another client of the attorney, or if that representation will be "materially limited by . . . a personal interest of the lawyer."⁵³ Additionally, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."⁵⁴ Other ethical obligations follow from the characterization of lawyers as officers of the court.⁵⁵ Although every lawyer is characterized as an officer of the court, at least one commentator has argued that government attorneys in some cases may have more responsibilities under that duty than do private attorneys, resulting in even greater ethical obligations for government attorneys.⁵⁶

is not implicated. *Id.* Additionally, the council and the executive are two different branches of government, rather than two different agencies, as Rule 1.11 contemplates. *Id.* R. 1.11 cmt. 5. Rule 1.11 is of little help in determining whether it applies to the city attorney's situation, as it states: "The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules." *Id.*

⁵³ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004). The full text for the conflict of interest for current clients rule is as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Id.

⁵⁴ *Id.* at R. 1.13(a).

⁵⁵ *Id.* at PMBL.

⁵⁶ Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 595-96 (1986). Rex Lee was the Solicitor General of the United States from 1981 to 1985. Lee argues that government attorneys should be "more sensitive to the values on the other side of the lawsuit than is true of lawyers in general" because "the

Some argue that at least in practice, if not on paper, government attorneys are not subject to the same conflict of interest rules as private attorneys.⁵⁷ The problem with this approach is that the codes of professional responsibility and rules of professional conduct adopted by the states usually have the force of law, and when no law exists that releases government attorneys from the ethical rules, disregarding ethical responsibilities in practice is against the law.⁵⁸ Knowing that the states often rely on the model codes promulgated by the American Bar Association, the National Association of Attorneys General attempted to have government attorneys

government's opponent, whether in a criminal case, a civil rights case, an antitrust case, or any other kind of case, is also a part of the public whose total interest the [government] lawyer serves." *Id.* at 596. Lee also argues that government lawyers must consider the scarce government resources that will be consumed by the lawsuits they file. *Id.* But see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 349-50 (2000). Cohen contends that "officer of the court" is a meaningless designation "caused by [lawyers'] self-love and self-promotion." *Id.* at 349. He argues that an attorney's role is properly viewed through agency law, and that "[w]hat little content [the phrase officer of the court] has points to a role of the attorney as agent whose obligations to the court are almost identical to those owed by non-lawyers and almost entirely consistent with duties to clients." *Id.* The Model Rules of Professional Conduct, however, characterize the duties of an officer of the court as those consistent with the duty of candor toward the tribunal, rather than as an agent of the client. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2 (2004).

⁵⁷ See, e.g., Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L. J. 13, 17 (2003). Berenson argues that courts have made special exceptions for government attorneys:

To put the differences between government lawyers and private practitioners regarding conflicts of interest succinctly, it appears that government lawyers will be accorded significantly more latitude to continue to represent clients in the face of alleged concurrent and former client conflicts than is the case with regard to private practitioners.

Id. at 47.

⁵⁸ Josephson & Pearce, *supra* note 36, at 562-63. Josephson and Pearce argue that the public-interest approach (where, in the context of their article, the client of the government attorney is defined to be the public interest, and the normal conflict of interest rules do not apply) abrogates adequate legal representation of public entities. *Id.* at 563-65.

Public office or public agency clients are no less and perhaps more deserving of adequate if not full legal representation. Denying that to them . . . serves only the personal interest of the controlling government lawyer. Providing for that government lawyer to represent both sides . . . means affording less adequate representation to conflicting public points of view than that to which conflicting private points of view are entitled.

Id. at 565.

exempted from certain rules, including the conflict of interest rules, during deliberations on the Model Rules.⁵⁹ The American Bar Association rejected the proposal.⁶⁰

These ethical rules are not easily reconcilable with the city attorney's duties. On the one hand, she must act in the best interest of her statutory client, the city, and all of its departments and officers. These interests are determined by the city's officials who have policy-making authority: the mayor and the council. On the other hand, she has an ethical and legal duty not to represent clients who are attempting to achieve opposing ends at the same time. Thus, when the mayor and the council have different interests, an impermissible conflict of interest exists.⁶¹

B. *Selection of the City Attorney and the Scope of Her Representation*

Who hired the government lawyer and the terms of her retention are factors to consider when a question exists as to who the government lawyer's client is, according to the Restatement of the Law Governing Lawyers.⁶² Cities select their attorneys in different ways in accordance with their particular charters. The city attorney may be appointed by the mayor, with or without confirmation by the city council, or be elected by the public. The residents of San Diego elect their city attorney.⁶³ In Cleveland, the mayor appoints the city attorney.⁶⁴ In Tampa, the mayor appoints the city attorney and the council confirms the appointment.⁶⁵ Where the mayor appoints the city attorney, the mayor often has the power to remove the city attorney as well.⁶⁶

The city charter imposes duties on the city attorney that generally include representing all departments and offices of the city in all legal cases, filing suits on behalf of those departments and offices, representing individual officials for matters connected to their official duties, and providing legal advice to the mayor, the council, and all departments and offices for legal

⁵⁹ Josephson & Pearce, *supra* note 36, at 557 n.86.

⁶⁰ *Id.*

⁶¹ This Note focuses more on the ethical ramifications of advising clients with different interests to achieve opposing ends than the logistics of one government body suing another. "Ordinarily, municipal departments and officials do not sue each other or the municipality, and inter-agency disputes are usually resolved politically . . ." Alperin, *supra* note 33, at 207.

⁶² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000).

⁶³ SAN DIEGO, CAL., CITY OF SAN DIEGO CHARTER art. V § 40 (2004).

⁶⁴ CLEVELAND, OHIO, CITY OF CLEVELAND CHARTER ch. 13 § 78 (2004).

⁶⁵ TAMPA, FLA., CITY OF TAMPA CHARTER § 6.03 (2004).

⁶⁶ See, e.g., CLEVELAND, OHIO, CITY OF CLEVELAND CHARTER ch. 11 § 70 (2004); TAMPA, FLA., CITY OF TAMPA CHARTER § 4.01 (2004).

matters pertaining to their official functions.⁶⁷ The city attorney's office generally does not assign attorneys to work on a permanent basis for the different city departments, but instead functions as the public equivalent of a private law firm to which all legal matters pertaining to the city must be assigned.⁶⁸

⁶⁷ See, e.g., SAN DIEGO, CAL., CITY OF SAN DIEGO CHARTER art. V § 40; CLEVELAND, OHIO, CITY OF CLEVELAND CHARTER ch. 15, § 83 (2004); TAMPA, FLA., CITY OF TAMPA CHARTER § 5.01. See also NATIONAL MUNICIPAL LEAGUE, MODEL CITY CHARTER § 4.03(b) (8th ed. 2003) ("The legal officer shall serve as chief legal adviser to the council, the manager, and all city departments, offices and agencies, shall represent the city in all legal proceedings and shall perform any other duties prescribed by state law, by this charter or by ordinance.") The Model City Charter advocates the city manager-council form of city government, where the council is elected and the council then selects the city manager from among the council members, in order to ensure that "all powers of the city [are] vested in a popularly elected council that appoints a professional manager who is continuously responsible to and removable by the council . . ." *Id.* at INTRODUCTION iii. The Model City Charter includes an appendix for those cities that prefer the strong mayor-council form of government, where the mayor is elected by the people and has significant power in the city government. *Id.* at APPENDIX. For the use of the manager-council form of government as a tool for avoiding conflicts of interest for city attorneys, see *infra* notes 110–17.

⁶⁸ But see Amanda Bronstad, *More than Distance Isolated Counsel from Departments: Up Front*, L.A. BUS. J., May 3, 2004, at 13. Bronstad discusses the assignment of Los Angeles assistant city attorneys to the revenue-generating city departments: the airport, the water and power department, and the port. These attorneys were physically assigned to the locations and were responsible for legal issues for each department. It would seem that the analysis pertaining to the client of a government agency attorney being the agency for whom the attorney works should apply, but in this case the assistant city attorneys were still under the supervision of the city attorney's office.

Still, the remote location [of the attorneys] created some tension between the departments and city, as well as some cynicism among city officials about whether the attorneys in those departments really represented the city's interests.

"Some of those attorneys think of themselves as corporate attorneys who work lot [sic] the agency, not for the city or the city attorney," [City Controller Laura] Chick said. "There have been times in the past when legal advice maybe wasn't in keeping the city in mind. When you send staff long-term to go work 'over there,' it just happens."

....

In an interview last week, Delgadillo [the City Attorney] said that the role of his office "is to be the legal counsel for the municipal corporation of Los Angeles, which is not the harbor department or the airport. At the end of the day, the client, the municipal corporation, can decide to take our advice or exclude us from a meeting if they so choose."

Id.

Regardless of the way in which the city attorney is selected, it is fairly well established that, as in a corporation,⁶⁹ representation of an individual client by a city attorney extends only to matters within the scope of the individual's official duties.⁷⁰ A government attorney cannot develop an

⁶⁹ See *supra* notes 31–33 and accompanying text.

⁷⁰ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000):

A lawyer employed by a governmental agency to represent persons accused of offenses in military court-martial proceedings, in a state-operated public-defender office, or in similar arrangements is properly regarded as representing the individual and not any governmental entity.

....

... A lawyer who represents a governmental official in the person's public capacity must conduct the representation to advance public interests as determined by appropriate governmental officers and not, if different, the personal interests of the occupant of the office.

Id. See also Note, *Maintaining Confidence in Confidentiality: The Application of the Attorney-Client Privilege to Government Counsel*, 112 HARV. L. REV. 1995, 2005 (1999) (arguing that the attorney-client privilege in the case of a government attorney should only protect communications between a public official and a government attorney if the communications are regarding the official's public duties). Case law also agrees with this scope of representation. In *Reed v. Baxter*, two council members asserted the attorney-client privilege for communications that took place between the two council members and the city attorney at a meeting where the city manager and the fire chief were present. *Reed v. Baxter*, 134 F.3d 351, 353–54 (6th Cir. 1998). The meeting was about alleged race-based promotions without merit within the fire department. *Id.* at 354. Because the meeting did not involve the full city council, the court held that the two council members were not clients for the purpose of the attorney-client privilege. *Id.* at 357. It was not within the scope of the council members' official duties to appear at a meeting without the rest of the council present to discuss conduct in which they did not participate. *Id.* at 358.

In *Ward v. Superior Court*, the county assessor sued county officials for libel and slander. *Ward v. Super. Ct.*, 138 Cal. Rptr. 532, 534 (Cal. Ct. App. 1977). The county assessor sought to disqualify the county counsel from representing the county officials because the county counsel had acted as legal counsel to the assessor for matters pertaining to the assessor's official duties. *Id.* The assessor also claimed that the county counsel had given him legal advice on personal matters, and represented him in his official and personal capacities in prior suits. *Id.* The county attorney agreed that he represented the assessor in previous actions, but asserted that neither he nor any members of his staff had represented the assessor in matters that did not involve the scope of the assessor's official duties. *Id.* at 534–35. The court agreed, finding that while the county counsel was by law obligated to provide representation to county officials in civil matters for actions within the scope of their official duties, the only client of the county counsel was the county itself and thus no attorney-client relationship could have been created between the assessor in his personal capacity and the county counsel. *Id.* at 537–38. There was no conflict of interest to disqualify the county counsel from representing the

attorney-client relationship with an individual in that individual's personal capacity when the attorney is representing the individual in the individual's official capacity.⁷¹ Thus, any information that the individual official provides to the government attorney during the course of such a representation is not subject to the attorney-client privilege and may be used by the attorney when she is advancing the interests of the organizational client.⁷²

C. The Client of the City Attorney in the Context of Ethics and Selection

Josephson and Pearce argue that an appointed government lawyer who serves at a particular official's pleasure represents that official if a conflict of interest arises between that official and other parts of the government, because an attorney who can be removed by an official has a personal interest in keeping that official satisfied with the attorney's work, so that the attorney can keep her job.⁷³ Some courts have also held that when a mayor appoints a city attorney, the city attorney's client is the mayor if a conflict

county officials in the assessor's action against the officials because the counsel never had an attorney-client relationship with the assessor personally. *Id.* at 537.

⁷¹ See Alperin, *supra* note 33, at 204-07.

⁷² Alperin, *supra* note 33, at 204. Jeffrey Rosenthal also analogizes a government lawyer to a lawyer for a private corporation:

A government agency also has been likened to that of a corporation And the [scope of representation] issue has arisen generally when an individual who has conferred with the corporate lawyer engages in conduct antithetical to the interests of the corporation. . . . It has been held that when the individual's conduct is at odds with the lawful corporate interests then the attorney-client relationship does not exist and the lawyer is not bound to maintain confidentiality; in fact, he or she is bound to disclose the information so as to preserve and protect the corporate interests. The conclusions concerning the representation of the corporate entity and not the individuals within the entity parallel the conclusion that the government lawyer represents the agency by whom he or she is employed, but not the individuals themselves within the agency.

Rosenthal, *supra* note 34, at 23.

⁷³ See Josephson & Pearce, *supra* note 36, at 564-65. Josephson and Pearce also contend that an elected attorney, serving at the pleasure of no one, is able to choose her client in the event of a conflict of interest (if she is not disqualified entirely due to the involvement of an official or agency who has the power to remove her from office). *Id.* This Note argues that this is an impractical solution that will only lead to more difficulty in identifying the client in the future. If the elected attorney chooses her client in the event of a conflict, she may be disqualified from representing either party in some circumstances in the future. Keeping track of such picking and choosing may prove difficult, resulting in substitution of counsel mid-way or most of the way through a trial, reversals of judgment on the technicality that counsel had a conflict of interest, and great expense to the taxpayers due to hiring independent counsel at the last minute.

arises, even if the ordinances say that a city attorney must represent the mayor, the council, and all city officials.⁷⁴

If the city attorney serves at the mayor's pleasure and can be fired at any time, it seems reasonable that she would have a material personal interest in the representation of the mayor that would prevent her from giving effective advice to the council.⁷⁵ In a heated battle between the mayor and the council, the wisest course of action for the city attorney may be to recognize the basic financial interest she has at stake and how it might influence, however subtly, her attempt to resolve the conflict. That the city attorney should choose to represent the mayor who appointed her if the mayor and council have a conflict of interest also seems somewhat congruent with her ethical responsibilities.⁷⁶ For example, trying to represent both parties would result in a situation in which one client's interests are directly adverse to another client's interests. Choosing the mayor as her client avoids implicating this factor of Model Rule 1.7.⁷⁷ Similarly, should she elect to represent the council instead of the mayor, she would have a personal interest—keeping her job—that would be inconsistent with the council's position of opposing the mayor. Representing the mayor would also resolve this personal conflict.⁷⁸

This is an imperfect solution, as the city attorney still has a client on each side of the case and is representing one client's interests that are adverse to

⁷⁴ In one case, the court held that the city council was entitled to independent counsel where the city solicitor had opposed the council and publicly favored the mayor's position. *Krahmer v. McClafferty*, 282 A.2d 631, 633 (Del. Super. Ct. 1971). The mayor appointed the solicitor with the council's approval. *Id.* at 633. The court said that the city solicitor's clients were the mayor and the council, but when conflict existed one party should retain independent counsel, despite the city charter's requirement that the city solicitor represent the mayor, the council, and all city officials. *Id.* The court noted that the city solicitor was without question an executive-branch employee and owed a duty to the executive branch when the legislative and executive branches conflicted. *Id.*

In another case, an assistant city attorney fired for his political affiliations brought suit against the mayor. *Finkelstein v. Barthelemy*, 678 F. Supp. 1255, 1256 (E.D. La. 1988). The mayor appointed the city attorney, and the city attorney appointed all assistant city attorneys. *Id.* at 1256. The city attorney's duties were to represent the mayor, the city council, and city departments. *Id.* at 1263. The court held that the mayor was the city attorney's client when interests conflicted and as such, the mayor was entitled to an attorney who was loyal and cooperative. *Id.* at 1264. The mayor's interest in political support outweighed the assistant city attorney's interest in expressing his political beliefs. *Id.* at 1265. The court noted that government attorneys are required to represent the interests of the government official for whom they work, and that the government official was entitled to fire anyone who does not support his politics. *Id.*

⁷⁵ See Josephson & Pearce, *supra* note 36, at 564.

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

another client's interests, even though she is not representing both sides at the same time. Model Rule 1.7 also limits this type of representation.⁷⁹ Because the city charter requires her to represent the council, she cannot simply declare that the council is not her client for the purposes of the present conflict. The analysis is even more difficult when the public elects the city attorney. No clear answer exists for this situation. Josephson and Pearce suggest that an elected attorney may choose her client in the event of a conflict, but give no guidelines on how to make that choice.⁸⁰ While an elected city attorney avoids the personal interest problem of the mayor-appointed city attorney, she still faces two clients whom the charter requires that she represent, and who have adverse interests. The publicly-elected attorney, like the appointed attorney, must analyze the situation and decide based on the particular facts whose directions she will follow.⁸¹

Considering the city attorney's ethical responsibilities in the context of her method of selection and the scope of her representation when identifying her client may help her to choose an option that minimizes some types of conflicts of interest, like the personal interest conflict of the mayor-appointed city attorney discussed above. Other conflicts of interest, like representing one client's interests that are adverse to another client's interests, will undoubtedly remain.

The law and analysis on identifying the city attorney's client are simply unclear. The three favored models identifying a government attorney's client in general, discussed in Part II, are inadequate. Considering the city attorney's ethical responsibilities in the context of her method of selection and the scope of her representation to identify the city attorney's client, as discussed in this Part, may help only to minimize some types of conflicts in some situations. Better solutions than the weighing of the various factors

⁷⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.7(a), *supra* note 53.

⁸⁰ Josephson & Pearce, *supra* note 36, at 564. If there is an official or agency who can remove her before her term has expired, then she probably has a conflict of interest should she represent an agency opposing that agency or individual. *Id.* at 564-65. *But see supra* note 73.

⁸¹ See Nolan, *supra* note 37. Nolan asserts that

identifying the client of the government lawyer as the people or the public interest does not address the issue of from whom the government lawyer may or must take directions, or to whom confidential communications may be revealed. This definition of the client also virtually guarantees that at some point the government lawyer will have multiple and competing interests claiming entitlement to those duties.

Id. at 39-40 (footnote omitted). In San Diego, for example, the city attorney is not taking direction from the city manager, the council, or the mayor, and is conducting his own investigation into the city's financial problems. *See supra* notes 7-10 and accompanying text.

considered in Part II and this Part exist. Amending the city charter, screening to avoid conflict, and avoiding the separation of powers in structuring city government are solutions that will make it easier to identify the city attorney's client and will help minimize conflicts of interest.

IV. SOLUTIONS TO THE CITY ATTORNEY'S CONFLICT OF INTEREST PROBLEM

The city council and the mayor will not always agree on what is in the best interests of the city. Disagreement at some point in time is inherent in any government. This is not a revelation. The city attorney has inevitable conflicts of interest thrust upon her by virtue of her charter-imposed duties—a charter that likely was drafted with the knowledge that disagreements would be forthcoming.⁸² The above discussion demonstrates how difficult it is to identify the city attorney's client in the case of a conflict. Also attendant with that determination are factors beyond the scope of this Note, such as how the attorney-client privilege applies once the city attorney has chosen a client in the case of a conflict. Subsequent adverse representation issues also must be considered: whether the city attorney's choice of client will affect the attorney's ability to effectively represent her organization later on, for example. Because it is so difficult to sort out these issues quickly during a conflict, having provisions in place that deal with conflicts of interest before such conflicts arise is preferable. Several possible solutions to the conflict of interest problem for city attorneys exist. The best solution is to amend the

⁸² And there is sometimes even disagreement while the charter is being drafted.

[W]hile the Mayor and the City Council agreed as to the need for a charter reform commission, they totally differed on how to proceed . . . the City Council preferred an advisory commission . . . after which the Council would decide what proposal to put before the voters. Mayor Riordan . . . wanted an elected commission that could place its proposed new Charter directly before the electorate.

Erwin Chemerinsky, *On Being a Framer: The Los Angeles Charter Reform Commission*, 2 GREEN BAG 2d 131, 133 (1999) (recounting his experience of being on the Los Angeles Charter Reform Commission).

Chemerinsky tells a tale that demonstrates the mayor and the city council having conflicting ideas about what is best for the city. *Id.* The council went ahead with its plan for an appointed commission, with the appointment power being spread among the members of the council, the mayor, the city attorney, and the city controller. *Id.* The mayor did not make appointments to the commission; instead he gathered the necessary signatures for a voter initiative for an elected commission to appear on the ballot. *Id.* The initiative passed, but the council refused to place it on the ballot. *Id.* Ultimately, a federal lawsuit was filed to make the council put it on the ballot. *Id.* The city attorney was elected. Had he been appointed by the mayor, arguably there would have been ethical questions raised regarding the propriety of his exercising the power with which the council vested him to appoint to the commission.

city charter to provide independent counsel as described in Part IV.A.1. A different type of charter amendment, screening to avoid conflict, and avoiding the separation of powers in structuring city government are also considered below.

A. Amend the City Charter to Provide Independent Counsel

Providing the city council with its own permanent independent attorney is the best solution, but it is a solution that some city governments may not wish to undertake due to cost or political ramifications, discussed in Part IV.A.3. An alternative is providing independent counsel to the council or the mayor, or both, on a case-by-case basis.

1. Provide the Council with Permanent Independent Representation

The best solution would be for cities to recognize the conflict of interest problem that arises when the city attorney is required to represent the city, all of its departments, and all of its officials for matters within the scope of their duties, and to amend the charter to correct the problem. The charter amendment would require the city attorney's office to provide legal representation for the mayor and for all of the departments under the mayor's authority. The charter amendment would also provide for separate legal representation for the city council, either by requiring the permanent retention of private independent counsel or by creating another municipal attorney position that would be under the exclusive control of the city council.⁸³ This solution is the best one because it provides a clear answer to the question of who the client of the city attorney is and whom the city attorney represents in the case of a conflict of interest. The charter-defined clients of the city attorney would be the mayor and the departments under the mayor's control. Conflicts of interest would not exist because the mayor is the highest policy-making authority in the executive branch. The mayor's direction should control if a dispute arises between an executive department head and the mayor.⁸⁴

⁸³ There is precedent in the federal government for this approach. The Office of the Senate Legal Counsel was established to eliminate "an increasing conflict of interest" in the Justice Department's representation of Congress in litigation arising out of the "exercise by Congress of its constitutional powers." Originally it was to be an Office of Congressional Legal Counsel, but the House would not agree to a joint office. "The concern was that congressional interests 'are often inadequately represented or are not represented at all' in such litigation." Nolan, *supra* note 37, at 41 n.171.

⁸⁴ This is not a conflict of interest problem for the city attorney. This is an authority issue between the mayor and the head of the executive department.

This solution, though it would prevent future conflicts for city attorneys, is likely to be unpopular among those who would have to draft and pass the charter amendments, for several reasons. Charter amendments often require a significant popular vote,⁸⁵ so the issue would have to be publicly advertised, which requires money. This charter amendment also requires a good deal of power-shuffling and redefining of the scope of official duties, something that elected governments are understandably reluctant to do if it may tip the balance out of their favor in the next election. One modified version of this plan has already been implemented by the Tampa city government, giving the city council the power to choose whether to select its own independent counsel before conflicts of interest arise.⁸⁶

Los Angeles, which has an elected city attorney, recently put a spin on the charter amendment solution that gives the council its own attorney. The Los Angeles Charter Reform Commission attempted to head off conflicts between the mayor and the city council by clarifying from whom the city attorney was to take direction in certain circumstances, effectively identifying the city attorney's client instead of providing for separate counsel.⁸⁷ The mayor is authorized to speak for the city in all matters in which a client would traditionally make decisions in any attorney-client relationship, except the mayor has no authority to settle lawsuits.⁸⁸ The council is the authorized representative of the city in suits challenging ordinances or council actions.⁸⁹ During the charter reform process, while the new charter was being drafted, the current mayor of Los Angeles proposed to add a second city attorney, who would be appointed by the mayor (as

Obviously, the highest elected government official should generally be the highest policy dispute resolution authority, superior even as to issues of law to the ranking government lawyer, especially if she appoints that lawyer. . . .

The first duty of the government lawyer, when confronted by a conflict among her government clients, is to refer the dispute to the policy superior of both her clients for resolution.

Josephson & Pearce, *supra* note 36, at 566. If the city attorney represented only the executive branch, then the phrase "conflict among her government clients" would refer to conflicts within the executive branch only. These conflicts would be resolved by the mayor as the highest policy-making authority, rather than by the city attorney attempting to identify her client.

⁸⁵ For example, the Model City Charter requires a majority vote of the public to pass a charter amendment. NAT'L CIVIC LEAGUE, MODEL CITY CHARTER § 8.02 (8th ed. 2003). A regular ordinance, however, can be passed with a majority vote of the city council. *Id.* § 2.11, cmt.

⁸⁶ See *supra* notes 19–25 and accompanying text.

⁸⁷ Chemerinsky, *supra* note 82, at 142.

⁸⁸ *Id.*

⁸⁹ *Id.*

opposed to being elected by the public), and who would handle all civil matters for the city, while the elected city attorney would continue to handle criminal matters.⁹⁰ The current elected city attorney strongly objected, and the Charter Reform Commission defeated the proposal.⁹¹

2. Provide the Council and the Mayor with Case-by-Case Independent Representation

Alternatively, the city could amend the charter to provide for the hiring of outside counsel if a conflict arises. This solution has already been implemented in New Orleans and Albuquerque.⁹² This solution might be preferable for city governments that do not wish to add a permanent independent counsel position because of political or cost concerns, but the hiring of outside counsel on a case-by-case basis comes with its own set of problems. The city attorney must again decide whom she is to represent, if she is indeed to represent any city official or department at all.⁹³ Other problems include who gets to decide when there is a conflict and who gets to select the outside counsel. If the mayor or the council are authorized to decide when a conflict of interest exists, then presumably any time the mayor or the council disagree with the city attorney or do not like her advice, they will solve the problem by employing independent counsel who will give them advice that they consider to be useful to meet their ends.

The city attorney, however, is capable of making an unbiased decision about whether a conflict exists by following the rules of professional conduct that bind her. She could refer to her state's equivalent of Model Rule 1.7, apply the standard, and choose to hire outside counsel for both sides of the dispute if it appears that she may otherwise be concurrently representing directly adverse interests, if there is a risk of such adverse representation, or

⁹⁰ *Id.* at 141.

⁹¹ *Id.*

⁹² See Stephanie Doster, *Council May Hire Outside Counsel: City Attorneys Shun Jail Case*, NEW ORLEANS TIMES-PICAYUNE, June 29, 2004, at 1. In a lawsuit filed by the police chief against the council to stop the council from forcing the chief to keep open the city jail, the city attorney said: "The police have their own attorney, and we recommend that the administration and the council look into outside counsel to represent their interests, because everyone's interest may not be the same.... The city attorneys represent the city, not any branch of the city." *Id.* In this case, the city attorney recommended that both sides get outside counsel to avoid a conflict of interest. *Id.*; Ed Asher, *Mayor, Council at Odds on Pact*, ALBUQUERQUE TRIB., April 6, 2004, at A3. In this case, the city hired an outside attorney to defend the mayor "because City Attorney Bob White has said he could have a conflict of interest between representing [Mayor] Chavez and advising the City Council." *Id.*

⁹³ If the city attorney did choose to represent one side of the conflict, she would be implicating Model Rule 1.7(a)(2). See *supra* notes 73–81 and accompanying text.

if she has a personal interest in the outcome that would limit her ability to represent one of the parties.⁹⁴ With a little foresight, the issue of who determines if a conflict exists, and by what standards, could also be addressed in the charter amendment, making this an effective solution to the conflict of interest problem.

3. *Public Policy Implications of Providing Independent Representation*

The public policy considerations of hiring independent counsel are at least threefold. First, simply by virtue of acknowledging the potential for a conflict of interest and employing separate counsel, or putting in place the mechanism to do so, public officials might perceive conflicts where none actually exist.⁹⁵ This may sour the relationship between the mayor and the council, making it difficult for either branch to accomplish anything.⁹⁶ Additionally, the public may see the mayor and the city council as continually butting heads instead of fulfilling their charter-imposed responsibilities, especially if it is newsworthy every time the mayor's

⁹⁴ MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2004).

⁹⁵ For example, the newest edition of the Model City Charter recommends against having separate city attorneys for the mayor and the council "because of the belief that local government should be unitary." NAT'L CIVIC LEAGUE, MODEL CITY CHARTER § 4.03 cmt. (8th ed. 2003). This edition of the Model City Charter also advocates a council-manager form of government instead of separation of powers into an executive and a legislative branch. See *id.* at MODEL BUILDING: A CONTINUING PROCESS.

⁹⁶ See Andy Reid, *Council May Hire Own Lawyer*, TAMPA TRIB., Feb. 13, 2004, at 5.

Iorio [(the mayor of Tampa)] opposes the council hiring its own attorney.

"There ought not to be an adversarial relationship," she said. "The city attorney represents everybody."

....

The concern about a council adviser appointed by the mayor's administration is that such an attorney must "serve two masters," which can create conflicts, Ferlita [a councilwoman] said.

"It's about independence," Councilman John Dingfelder said. "Sometimes it does come up that the administration's opinion is different than ours."

Id. See also Karp, *supra* note 24. "[The mayor] promised to work with council members to make sure they were satisfied with their legal advice. If the council gets its own lawyer, its relationship with her might get adversarial, she said." *Id.* The mayor is not the only city official in Tampa that opposed the council hiring independent counsel before a conflict arises. See Graham, *supra* note 19. "Not every council member wanted an attorney separate from the city attorney, who also represents the mayor. Council member Mary Alvarez said early in the process that hiring an independent attorney could create the perception of a division between the mayor and the council." *Id.*

attorney and the council's attorney have to negotiate with one another. Part of this may stem from the public's view of lawyers in general as impediments to accomplishing goals instead of as facilitators.

Two additional concerns are the cost of the independent counsel and the identity of the independent counsel, and are thus more applicable to the solution discussed in Part IV.A.2: amending the charter to provide case-by-case independent representation. Costs can be more easily controlled if the charter were amended to provide a permanent independent attorney for the city council, especially if that attorney were a municipal employee. Costs of independent counsel and identity of independent counsel intersect with one another. Fees for independent counsel can be exorbitant.⁹⁷ No elected official will want to claim responsibility for increasing the city's budget by hiring more lawyers. If the city attorney is given the authority to make the decision to hire outside counsel, costs will be somewhat controlled because outside counsel will not be hired more often than is absolutely necessary to ensure adequate representation.⁹⁸

The recipients of these fees need to be chosen carefully to prevent "pay-to-play" issues. If a law firm is a huge contributor to the mayor's re-election campaign, and is subsequently awarded all outside legal work and paid sky-high fees to do it, the choice of counsel is probably not in the best interests of the city.⁹⁹ The same argument can be made for large contributors to council

⁹⁷ See, e.g., Rick Orlov, *City Costs Under Scrutiny: Payments to Lawyers Soar*, DAILY NEWS OF LOS ANGELES, Oct. 26, 2004, at N6. Payments to independent counsel were almost \$30 million in 2003, up from \$18.7 million in 2001, when the current Los Angeles city attorney, Rocky Delgadillo, was elected. *Id.* Decisions to hire outside counsel for the airport, harbor, and water and power departments were often made without consulting the city attorney. *Id.* When confronted with the report, Delgadillo said he planned to "implement internal procedures to review all requests for private attorneys and also seek greater City Council review for other agencies." *Id.* He also defended the hiring of outside counsel by pointing out that the amount the city was paying out in liability was \$98 million in 2001, and in 2003 was \$46 million. *Id.*

⁹⁸ See *supra* notes 93-94 and accompanying text.

⁹⁹ For an example of questionable hiring decisions of outside counsel by the city attorney, see Patrick McGreevy, *L.A.'s Outside Legal Bills Surge: Most of the Law Firms Give to Hahn, Delgadillo Campaigns*, L.A. TIMES, May 16, 2004, at B1. While not discussing hiring of outside counsel to deal with conflicts of interest per se, the article describes the trend of the elected city attorney (Delgadillo) entering into contracts with outside law firms (as he is permitted to do under the Los Angeles charter) that are also large contributors to his political campaign and to the mayor's political campaign. *Id.* "It's on its face a conflict of interest," said Benjamin Bycel, former executive director of the city Ethics Commission. "It's, in effect, buying government contracts, and it erodes the public trust in those doing the public's business." *Id.* Even though the mayor also benefited from large campaign contributions by law firms who were then given lucrative contracts with the city, "[t]he mayor has said in recent months that he believes a troubling appearance is created when city contractors raise money for the politicians who have a

members' campaigns, and where the city attorney is elected, to the city attorney's campaign.¹⁰⁰ If the city attorney is authorized to make the decision of whom to hire, this issue still can be a concern if the city attorney's employment is directly tied to the continuation of the mayor in office. The city attorney is still competent to make the decision as long as she advances the best interests of the organization and not the interests of any individuals within the organization.¹⁰¹

B. Screen the City Attorney and Her Staff to Avoid Conflicts

Another choice to prevent conflict of interest situations is screening: attorneys from the city attorney's office represent each party to the matter, but have no contact material to the case with one another while the issue is pending. This is a popular, and inexpensive, solution for government attorneys.¹⁰² This solution, however, implicates Model Rule 1.10(a).¹⁰³

say in hiring them." *Id.* Because of this concern, the mayor "proposed banning city contractors, including law firms, from contributing to, or raising funds for, city politicians, including while bidders are competing for contracts." *Id.* at B1. The article includes a list of the fifteen law firms paid the most money by the city of Los Angeles in Fiscal Year 2002-03, and a list of the top fifteen law-firm contributors to candidates for city office for the same time period. *Id.* Correlations are evident.

¹⁰⁰ *See id.*

¹⁰¹ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

¹⁰² *See Berenson, supra* note 57, at 59-62 (discussing ways that public attorneys can serve the public interest). Berenson discusses several cases where the court found it permissible for two attorneys from the same government attorney's office to represent opposing interests so long as there was an effective screening mechanism in place to prevent the attorneys from inadvertently influencing one another. *Id.*

¹⁰³ MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2004). The full text of Model Rule 1.10 is as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected

Model Rule 1.10(a) prohibits an attorney in a firm from representing a client if another attorney in that firm would be prohibited from representing the client.¹⁰⁴ If the city attorney identifies a conflict of interest such that she could not ethically represent the opposing party, Model Rule 1.10(a) prohibits anyone in her office from representing the opposing party, just as the rule would operate in private practice. One could argue that the city attorney's disqualification is based on a personal interest if she is appointed by the mayor, and thus that her staff should not be prohibited from representing the other client.¹⁰⁵ That argument ignores the fact that a hierarchy of interest in continued employment exists here, from the city attorney down through her staff. It also does not deal with the current client conflict of interest. Screening also ignores the realities of working in an office with others. The party relying on the screen has the burden of proving its effectiveness: "[I]f there has been improper contact, it would likely be known only to the lawyers involved A party challenging the dual representation would have virtually no way of obtaining evidence to demonstrate any impropriety."¹⁰⁶

Model Rule 1.11 does allow some screening for attorneys who have formerly worked in government. When a former government attorney's private firm undertakes representation of a client in a matter in which the former government attorney "participated personally and substantially" in her capacity as a government attorney, the private firm can ethically continue to represent the client as long as the former government attorney is screened from participation in the representation.¹⁰⁷ This suggests that it might be

client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Id. at R. 1.10.

¹⁰⁴ *Id.* R. 1.10(a).

¹⁰⁵ *Id.*

¹⁰⁶ *Howitt v. Super. Ct.*, 5 Cal. Rptr. 2d 196, 203-04 (Cal. Ct. App. 1992). The context of *Howitt* was that the county counsel's office was acting both as counsel for the sheriff's department and for the employment appeals board in a dispute between a sheriff and the sheriff's department before the board, which functioned as the decision-maker in the case. *Id.* at 197. In a footnote, the court also explained: "[W]e do not envision that an adequate screening procedure for due process purposes requires the creation of functionally separate offices. . . . It should be sufficient if the lawyer advising the Board has no potential involvement in or responsibility for the preparation or presentation of the case." *Id.* at 204 n.4.

¹⁰⁷ MODEL RULES OF PROF'L CONDUCT R. 1.11 (2004). The relevant portion of Model Rule 1.11 is as follows:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

possible to implement a screening procedure for the city attorney's office which would minimize current client conflicts of interest and which would be ethically acceptable. One of the policy reasons for Model Rule 1.11 is that the "government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."¹⁰⁸ In other words, we should not make it too difficult for government attorneys to move to private practice, or vice versa, otherwise they will not want to work for the government. This special imputation "rule represents a balancing of these interests."¹⁰⁹

Allowing screening to avoid conflicts of interest for city attorneys also represents a balancing of several interests. First, we want the city attorney to meet her ethical obligations. Second, the city government has an interest in maintaining its budget. Third, the city government also has an interest in expedient resolution of conflicts. If the city attorney is required by charter to represent the city council and the mayor, and the charter contains no conflict of interest provisions, resolution of the legal issue may come to a complete standstill while the mayor, the council, and the city attorney figure out who the client is, whether there is a conflict, whether to hire outside counsel, whom to hire, and how much to pay for outside representation.

This type of bureaucratic delay already runs rampant in federal, state, and city governments, and it is only exacerbated by the length of time it takes for a lawsuit to travel through the court system if need be. If screening helps to avoid these complications, then perhaps a balancing of interests between Model Rule 1.7 and the city government's interests is in order. I have established already that the city attorney's conflict of interest dilemma has no neat resolution; this is simply a practical suggestion. Screening has the

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Id. While Model Rule 1.11 is not directly applicable to the city attorney's situation, see *supra* note 52, it does suggest that screening may be acceptable in other situations involving important policy concerns.

¹⁰⁸ *Id.* cmt. 4.

¹⁰⁹ *Id.*

advantages of being low-cost, easy to implement, and a much less extreme suggestion than either amending the city charter as discussed in Part IV.A, or by changing the structure of city government, as discussed in Part IV.C. Because of these benefits, states should amend their ethics codes to allow screening in these circumstances.

C. Avoid Representation Conflicts by Avoiding Separation of Powers

A city that uses the council-manager form of government may be able to avoid conflicts of interest for the city attorney by avoiding the separation of powers that normally occurs in a strong mayor-council form of government. With the city government unified under the city council, the city attorney would have only one client. This solution is a preventative measure, most reasonably implemented when the city is either writing its first charter or in the process of reforming an old one.¹¹⁰

The traditional council-manager form of city government consists of a popularly elected city council, and a city manager who is elected by the city council from the members of the city council.¹¹¹ The mayor is also a member of the city council, elected either popularly or by the city council.¹¹² The city manager, as opposed to a popularly elected mayor in the strong mayor-council form of government, is the chief executive of the city and responsible to the city council.¹¹³ He may be removed by a majority vote of the council.¹¹⁴ The city manager is responsible for appointing officers and department heads.¹¹⁵ The city government under this structure is not divided into branches, but is unified in the city council.

If the city manager appoints the city attorney, the city attorney's client is arguably the entire council, because the city manager may be removed by the council. If the council members disagree among themselves, that is an issue of who the highest policy-making authority is, not a conflict of interest for the city attorney, and that issue must be resolved within the council.¹¹⁶

¹¹⁰ See *supra* notes 82, 87–91 and accompanying text for a discussion of Erwin Chemerinsky's experiences as a charter framer for the new Los Angeles City Charter.

¹¹¹ NAT'L CIVIC LEAGUE, MODEL CITY CHARTER arts. II, III (8th ed. 2003).

¹¹² *Id.* § 2.03.

¹¹³ *Id.* § 3.04.

¹¹⁴ *Id.* § 3.02. San Diego already has a council-manager form of city government, but the city attorney in San Diego is elected rather than appointed by the city manager. See SAN DIEGO, CAL., CITY OF SAN DIEGO CHARTER art. V (2004). Thus, San Diego's city attorney will still have to choose whom to represent in the case of a conflict of interest. See *supra* notes 80–81 and accompanying text.

¹¹⁵ NAT'L CIVIC LEAGUE, MODEL CITY CHARTER § 3.04 (8th ed. 2003).

¹¹⁶ See, e.g., *supra* note 84 and accompanying text. This situation also possibly implicates Rule 1.13 of the Model Rules of Professional Conduct, because the city

The situation is different in a city that is structured under the council-manager form of government but has a popularly elected city attorney. This is the form of government that San Diego has, but as illustrated in Part I of this Note, without a clear determination of the identity of the city attorney's client, it may still result in conflicts of interest.¹¹⁷

D. Do Nothing and Resolve Representation Conflicts as They Arise

Amending the charter, setting up a screening process, and changing the structure of city government may seem onerous. Fearing overkill that may do more harm than good, a city may choose to do nothing at all and simply deal with each conflict of interest as it arises. If the clients are aware of the conflict and consent to the representation, in most situations, the representation is ethical.¹¹⁸ It is an inexpensive solution, at least in the beginning. It does not change the status quo and is unlikely to make new political enemies for any elected official. Doing nothing and attempting to resolve representation issues when a conflict arises, however, is an inefficient solution that at best will delay adjudication of the matter or advice to the client, and at worst will result in compromised representation for at least one of the parties. Compromised representation is substandard representation.¹¹⁹

attorney will have to determine which individuals have the authority to speak for the organization. The council members may not be acting in their official capacities if they approach the city attorney individually for advice or representation, depending on the scope of their official duties. *See Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998) (holding that two city council members who attended a meeting that was not attended by the rest of the city council members were not clients of the city attorney for the purpose of the attorney-client privilege). The decision in *Reed*, however, was also based on the fact that the city council itself was not responsible for the promotion of the firefighter. Therefore, at a meeting to investigate why the firefighter was promoted, the clients of the city attorney were the city manager and the fire chief. *Id.* at 358. If the city attorney determines that the individual council members are not acting within the scope of their official duties, then she can decline to give legal advice or representation. *See supra* notes 69–72 and accompanying text. *See also supra* note 70 and accompanying text.

¹¹⁷ *See supra* notes 2–10, 80–81 and accompanying text.

¹¹⁸ There are situations in which representation is prohibited regardless of consent. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 14–17 (2004). In some states, this may include the ability of a municipality to consent to a conflict of interest. *Id.* R. 1.7 cmt. 16. Unconsentable representations also include matters in which the two clients have positions "aligned directly against each other" in a proceeding that is before a tribunal. *Id.* R. 1.7 cmt. 17. The comments to the Rule, however, say that whether two clients "aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding." *Id.*

¹¹⁹ *See Josephson & Pearce, supra* note 36, at 565 (arguing that "[p]ublic office or public agency clients are no less and perhaps more deserving of adequate if not full legal representation").

V. CONCLUSION

The law of ethics for city attorneys in conflict of interest situations is fundamentally unclear. City attorney conflicts of interest have recently been reported in the media with some frequency. Because of the prevalence of such conflicts and the degree of disruption they cause, the problem must be addressed. Although the first requirement in determining whether there is a conflict of interest is to "clearly identify the client,"¹²⁰ no useful model exists that takes account of the city attorney's charter-imposed duty to represent the mayor and the city council at the same time. Considering the city attorney's ethical obligations in the context of the method of her selection and the scope of her representation is helpful in minimizing some types of conflicts of interest, but inadequately addresses other types. Because of this uncertainty, solutions that avoid conflicts of interest need to be explored.

Providing the city council with its own permanent representation via a charter amendment both clearly identifies the client and at the same time removes the possibility of conflicts of interest when the mayor's interests are different from the council's interests. This is the best solution and one that can be implemented in every city.

For cities reluctant to amend their charters to give their councils permanent independent representation, due to political or financial concerns, the city attorney may find some relief from conflicts with a charter amendment that allows for case-by-case independent representation. Although screening does not exactly comport with Model Rule 1.7, it does implicate some policy reasons that suggest that a balancing of interests between Model Rule 1.7 and the city government's interests may make screening acceptable for city attorneys.

Finally, cities that are on the verge of charter reform or that are preparing to draft their first charter should strongly consider the council-manager structure of city government. With all of the policy-making authority concentrated in one body, disputes within that body are resolved by the highest policy-making authority and not by the city attorney. Should a city choose not to implement a solution to the city attorney's conflict of interest problem, a consequence may be substandard representation for at least one of the parties involved.

¹²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (2004).